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3637

PATENT

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Serial No.: 09/975,386

Filed: October 11, 2001

For: Insulation Blanket With Cut Guidelines

Inventors: Kenneth D. Knapp

Examiner: A, Phi Dieu Tran

Art Unit: 3637

Atty. Doc. No.: 024-01

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**APPEAL BRIEF**

Mail Stop Appeal Brief Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**I. REAL PARTY IN INTEREST**

The real party in interest is CertainTeed Corporation, a corporation of Delaware, having a principal place of business at 750 E. Swedesford Road, Valley Forge, PA 19482.

**II. RELATED APPEALS AND INTERFERENCES**

There are no related appeals or interferences.

**III. STATUS OF THE CLAIMS**

This brief is being submitted in support of Appellant's Appeal from the decision of the Examiner of art unit 3637 of June 4, 2004, which for the third time, rejected Appellant's claims 1-9 in this application.

No claims are allowed. Claims 1-9 are being appealed.

#### **IV. STATUS OF AMENDMENTS**

The claim amendment submitted January 14, 2004 and not entered at that time was entered in this case as of March 15, 2004 following Appellant's submission of an RCE on March 2, 2004 and now is part of this application.

#### **V. SUMMARY OF CLAIMED SUBJECT MATTER**

This invention, as applied to independent claim 1, is concisely explained as a blanket of insulation 10; with the blanket being specifically designed to be cut-to-size between studs, rafters, etc. that are evenly spaced apart a given dimension (like wall studs are generally 16 inches apart) or those that are unevenly spaced-apart a lesser amount (like at an end-of-wall or alongside windows or doorways in a wall, etc.).

The blanket of insulation 10 has a thicker insulation layer 11 and a thinner facing material or layer 12, adhered together by an adhesive layer 13 of a substance such as bitumen or asphalt.

The facing layer 12 has a grid of perforations 20 and the grid of perforations is applied to the facing layer 12, so that spots 20 of adhesive are visible through the perforations when viewed from the side of the facing layer (pg. 2 lines 3-12). This is so that the spots 20 of the adhesive showing through the perforations form a grid that defines predetermined various cut lines from which the installer may select in cutting the blanket to a lesser dimension than the given dimension, to accommodate studs or like spaced-apart structural members that are spaced more closely apart than the given dimension (pg. 2 lines 7-12).

This allows for versatility in using a given sized blanket of insulation between studs or like structural members of various dimensions.

It is the grid of perforations 20 that comprises the means for defining generally straight predetermined cut lines for cutting the facing layer 12 and the insulation layer 11 in accordance with the pattern defined by the spots 20 of adhesive (pg. 2 line 13, pg. 3 line 2; Figs. 1-3).

This invention, as to independent claim 8, is concisely explained as a method of making a blanket of fibrous building insulation for use in openings between studs, rafters, etc. that are evenly spaced-apart a given dimension (like wall studs are generally 16 inches apart) or those that are unevenly spaced-apart a lesser amount (like at

an end-of-wall or alongside windows or doorways in a wall, etc.; Fig. 3), involving the steps (pg. 3 lines 9-13) of providing a thin layer of facing material 50 (Fig. 4; pg. 7 lines 3-11) for later application to thicker fibrous insulation 64 (pg. 7 line 17), with preformed perforations in the facing material defining a grid (20; Figs. 1-2) providing visual guidelines for cutting the blanket to size to accommodate irregular spaces between spaced-apart structural members (Fig. 3; pg. 7 lines 15-18), delivering the facing material to a site of blanket formation (Fig. 4), applying a thin layer of adhesive (62; Fig. 4) while maintaining the adhesive at a viscosity to bleed into the perforations to be visible from an opposite surface of the facing material (pg. 2 lines 3-12; pg. 3 lines 3-8; Fig. 4), applying a layer of fibrous insulation thicker than the facing material and adhesive at the site of blanket formation (Fig. 4) and allowing the adhesive to set and adhere the facing material to the fibrous insulation layer (pg. 7 lines 17-18).

As to dependent method claim 9, which is dependent upon claim 8, such is concisely explained as then cutting the blanket along a line of perforations to correspond in width to a predetermined spacing between structural members and fastening a portion of the cut blanket in the predetermined spacing between structural members (pg. 3 lines 9-13; Fig. 3; pg. 6 line 14-pg. 7 line 2; pg. 8 line 13-pg. 9 line 2).

#### VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-2, 4 and 8 are rejected under 35 U.S.C. §102(e) as being anticipated by Ernst 6,444,289.

Claim 3 is rejected under 35 U.S.C. §103(a) as being unpatentable over Ernst 6,444,289 in view of Broderick 4,709,523.

Claims 5-7 are rejected under 35 U.S.C. §103(a) as being unpatentable over Ernst 6,444,289.

Claim 9 is rejected under 35 U.S.C. §103(a) as being unpatentable over Ernst 6,444,289 in view of Ryan 649,363.

#### VII. ARGUMENT

1. **The Clear Admonition of Ernst as to What *Not* to do, to Avoid Making Ernst Inoperable, Is Exactly What The Examiner Would do to Ernst. All of The Rejections are Based Upon Ernst and Therefore Must Fail.**

The Examiner wants to clog the holes of Ernst so that Ernst cannot vent the high static pressure. In doing so the Examiner defies the specific admonition of Ernst not to do so, because, as Ernst explains, if such were done “the intended function of the perforations 26, which is to allow sufficient gas flow through the facing layer 20, would be defeated or at least compromised.” (column 4 lines 25-28)

Ernst repeatedly emphasizes the importance of keeping the perforations open:

If the flow of air through the perforations 26 is restricted by the presence of the adhesive 24 within the perforations 26, the relatively high static pressure differential between the outer and inner surfaces 20a, 20b could cause the pressure-balancing regions 20c, 20d to balloon or be drawn away from the side panels 14a, 14b. In turn this ballooning effect could cause the facing layer 20 and the insulation layer 18 to become separated.

That the Examiner would choose to modify Ernst to destroy Ernst is contrary to every decision of the Federal Circuit relevant to the issue.

The rejection that the Examiner makes is based upon a selective taking from Ernst as to specifically what *not to do*, which the Examiner applies as though that is what Ernst teaches. No use of Ernst that would destroy Ernst is an acceptable basis for rejection. The Federal Circuit has been as clear as can be that a rejection must be reversed if, in order to meet the terms of a claim, the base reference were “rendered inoperable for its intended purpose”. *In re Gordon* 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984).

Indeed, if the French apparatus were turned upside down, it would be rendered inoperable for its intended purpose. The gasoline to be filtered would be trapped in pocket 9 and the water French seeks to separate would flow freely out of the outlet 5....  
Reversed.

Thus, clogging the holes of Ernst to render Ernst inoperable for its intended purpose is reversible error, such that, for this reason alone, the rejections of all of claims 1-9 must be reversed.

The Federal Circuit in *In re Fitch* 972 F.2d 1260, 1265, 23 USPQ 2d 1780, 1783, 1784 (Fed.Cir. 1992) enunciated specifically that in Patent Office proceedings a teaching of modifying is absolutely necessary:

In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art.

"[The Examiner] can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references." The patent applicant may then attack the Examiner's prima facie determination as improperly made out, or the applicant may present objective evidence tending to support a conclusion of nonobviousness.

**2. The Teaching That The Examiner Would Make to Modify Ernst Against Its Specific Teaching Can Only Have Come From Appellant's Own Disclosure, Which of Course Cannot Be Relied Upon As A Basis For Modifying A Reference, As A Matter of Law.**

Nowhere in Ernst is there any suggestion whatever of using the perforations 26 of Ernst as cut guidelines. In fact, nowhere in Ernst is there any suggestion whatever of using the piece of insulation of Ernst between studs, or other structural members that are *both* of a given size, and between studs or structural members that are *less than* a given size. Where this teaching is present is in Appellant's own disclosure (including Appellant's claims).

It is elementary patent law that Appellant's own disclosure may not be used as a teaching reference, as the Examiner has done. In doing so, the Examiner falls into the hindsight trap, defying the requirement of the Federal Circuit that an applicant's disclosure cannot be used as a hindsight teaching.

In *In re Dembicza*k, 175 F.3d 994, 50 USPQ2d 1614 (Fed. Cir. 1999), the Court stated:

In this case, the Board fell into the hindsight trap.

In *In re Zurko*, 111 F.3d 887, 42 USPQ2d 1476 (Fed. Cir. 1997), the Court

again noted that the Board impermissibly used hindsight to arrive at the claimed invention, stating:

To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.'

The rejection must fail, for it is predicated upon the use of hindsight from Appellant's own teaching.

**3. If The Ernst Furnace Insulation Assembly Is In Fact Modified To Make Ernst Unworkable as The Examiner Would Do, There Are Still Patentable Features In The Preamble and Body of Each Claim That Are Not Taught In Ernst.**

The Examiner gives no weight to the structural and functional features, instead declaring them inherent.

For example, the Examiner gives no weight to the statement of use in the preambles of the claims.

**GROUPING OF CLAIMS**

The claims do not stand or fall together.

Claims 1-4 stand or fall together. Claims 5-9 each stand alone, from each other and from each of claims 1-4.

**SEPARATE ARGUMENT IN SUPPORT O F CLAIMS 1-4**

Claim 1, for example requires that the insulation be "for installation in openings between studs, beams, rafters or like spaced-apart structural members that are *evenly spaced-apart* as well as between structural members that are *irregularly spaced-apart*".

There is no suggestion whatever in Ernst of such a statement of intended use. And this statement of intended use gives life and meaning to the relevant portion of the body of the claim which recites "whereby... the blanket of insulation may readily be cut along a line of said spots of adhesive to accommodate spaces between spaced-apart structural members of lesser spacing than said given dimension." Note that such "means plus function" language defines structure in the body of claim 1, as well as being present in the preamble. The fact that it is present in both the preamble of the claim and in the

body of the claim absolutely requires that it be treated as a claim limitation in the preamble, as well as a claim limitation in the body of the claim. See *In re Fritch* 972 F.2d 1260, 1262, 23 USPQ 2d 1780, 1781 (Fed. Cir. 1992).

The critical language in Fritch's independent claims is that the device is to be, in its entirety, both flexible and "conformable to a ground surface of varying slope". These limitations, although located in the claims' preambles, "are necessary to give meaning to the claim[s] and properly define the invention".

See also *Bell Communications Research Inc. v. Vitalink Communications Corp.* 34 USPQ 2d 1816, 1820 (Fed. Cir. 1995).

One of our predecessor courts summarized this approach in *Kropa v. Robie*, 187 F.2d 150, 88 USPQ 478 (CCPA 1951), after reviewing some 37 cases that turned on the limiting nature of the preambles to the claims in suit. According to the court in *Kropa*,

the preamble has been denied the effect of a limitation where... the claim or [interference] count apart from the introductory clause completely defined the subject matter [of the invention], and the preamble merely stated a purpose or intended use of that subject matter. On the other hand, in those... cases where the preamble to the claim or count was expressly or by necessary implication given the effect of a limitation, the introductory phrase was deemed essential to point out the invention defined by the claim or count. In the latter class of cases, the preamble was considered necessary to give life, meaning and vitality to the claims or count. *Id.* At 152, 88 USPQ at 480-81.

See also *General Electric Co. v. Nintendo Co.* 179 F. 3d 1350, 50 USPQ 2d 1910, 1918 (Fed. Cir. 1999).

We must, thus, determine whether the preamble breathes life and meaning into the claim, and is incorporated by reference because of language appearing later in the claim, making it a limitation of the claim. See *In re Paulsen* 30 F.3d 1475, 1479, 31 USPQ2d 1671, 1673 (Fed. Cir. 1994) ("Terms appearing in a preamble may be deemed limitations of a claim when they 'give meaning to the claim and properly define the invention'") (quoting *Gerber Garment Tech., Inc. v. Lectra Sys., Inc.* 916 F.2d 683, 688, 16 USPQ2d 1436, 1441 (Fed. Cir. 1990)).

And in *Gerber Garment Technology Inc. v. Lectra Systems Inc.* 916 F2d 683, 688, 16 USPQ 2d 1436, 1441 (Fed. Cir. 1990), the court noted that when a feature appears not only in the preamble but is referenced in the body of the claim, it is integral to the claim itself.

The cutting blade is “necessary to give meaning” to claims 15 and 16 and “properly define the invention.” *Perkin-Elmer*, 732 F.2d at 896, 221 USPQ at 675. The cutting blade appears not only in the preamble, but is referenced repeatedly in the body of the claim. It is integral to the claim itself.

Moving on, the preamble of claim 1 of the instant application goes on to require:

cutting guide lines for use in providing visual guidelines for cutting the blanket to size to accommodate irregular spaces between spaced-apart structural members

This portion of the preamble likewise gives life and meaning to the above-quoted feature from clause (g) of claim 1, along with the language from clause (f) of claim 1 as follows:

the grid of perforations comprising means defining generally straight, predetermined cut lines for cutting the facing sheet and insulation in accordance with a pattern defined by at least some of said spots of adhesive

The clause (f) language defines structure in the “means plus function” language, which structure is nowhere taught in, nor suggested in, Ernst.

Claims 2-4 each depend from and contain all of the features of claim 1 and should be properly allowable therewith for the reasons addressed above with respect to claim 1.

#### SEPARATE ARGUMENT IN SUPPORT OF CLAIM 3

Claim 3 has been rejected as being obvious over a combination of Ernst and Broderick et al '523. Broderick adds nothing to the combination that would overcome the deficiencies of the rejection of claim 1 above, and thus claim 3 should be properly allowable with claim 1.

#### SEPARATE ARGUMENT IN SUPPORT OF CLAIM 5

Claim 5 depends from claim 4, which in turn depends from claim 1, with claim 5 requiring four vertical, generally parallel spaced apart cut lines approximately 3

inches apart. This limitation is nowhere suggested in Ernst, and the Examiner simply declares the same obvious, without support. However, there is a reason for this limitation, in that it allows for five zones of insulation, from left-to-right, with four cut lines defining the five zones, each 3 inches apart, amounting to 15 inches width of insulation, in order to correspond to any easy fit between vertical studs that are 16 inches apart on centers, to provide four easy-to-apply cut lines.

#### SEPARATE ARGUMENT IN SUPPORT OF CLAIM 6

Claim 6 is similar to claim 5, but requires that the grid of perforations comprise three spaced-apart cut lines, each 3  $\frac{3}{4}$  inches apart. Again, such provides a multiple of cut lines, that define insulation zones, that together, form a ready fit between relatively standard vertical studs that are spaced-apart 16 inches on centers. The features of claim 6 are nowhere suggested in Ernst, but are simply declared obvious by the Examiner, without support.

#### SEPARATE ARGUMENT IN SUPPORT OF CLAIM 7

Claim 7 addresses a different spacing-apart of zones of insulation between cut lines, wherein the cut lines are approximately 1  $\frac{1}{2}$  inches apart, that provide yet a greater plurality of cut lines for an even greater number of variations. Again, this feature is not suggested in Ernst and is simply declared obvious by the Examiner, without support.

Each of claims 5, 6 and 7, therefore have specific limitations not anywhere suggested by Ernst, and for specific reasons. It is not enough simply to declare them obvious. The mere fact that prior art may be modified does not make the modification obvious unless the prior art *suggests* the desirability of the modification. See *In re Fritch*, 972 F.2d 1260, 23 USPQ2d 1780 (Fed. Cir. 1992):

The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.

#### SEPARATE ARGUMENTS IN SUPPORT OF CLAIM 8

Independent claim 8, directed to a method of making a blanket, likewise includes in its preamble that the blanket of insulation is “for use in openings between studs, between rafters, or between like spaced-apart structural members that are evenly spaced-apart as well as between such structural members that are irregularly spaced-

apart. As with claim 1, this statement of intended use in the preamble of the claim gives life and meaning to the language of clause (a) of claim 8 addressing the cutting guidelines for use in providing visual guidance for cutting the blanket to size to accommodate irregular spaces between spaced-apart structural members.

Claim 8 additionally specifically requires in its clause (c)

applying a thin layer of adhesive, that is substantially thinner than the layer of fibrous insulation, to a surface of the facing material while maintaining the adhesive at a sufficient viscosity that it will bleed into the perforations an amount sufficient to be visible from an opposite surface of the facing material

This is a specific process limitation not taught in, and the antithesis of, Ernst.

#### SEPARATE ARGUMENTS IN SUPPORT OF CLAIM 9

Claim 9 should be allowable for all of the reasons set forth above with respect to claim 8, in that the entirety of claim 8 is included in clause (a) of claim 9.

Additionally, claim 9 requires the specific step of cutting the blanket along a line of perforations to correspond the width of the blanket to a predetermined spacing between structural members. No such teaching is anywhere present in Ernst.

Moreover, claim 9 goes on to require the specific step in clause (c)

fastening a portion of the cut blanket of fibrous building insulation in the predetermined spacing between structural members

Again, nowhere in Ernst is there any such teaching.

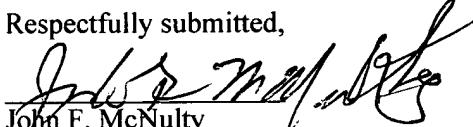
#### ADDITIONAL SEPARATE ARGUMENT IN SUPPORT OF CLAIM 9

The Examiner has rejected claim 9 under Section 103 over Ernst in view of Ryan '363. The Examiner relies upon Ryan for the step of fastening a structure between spaced apart studs. But that which is fastened in Ryan is plasterboard, and one should not be misled by the perforations (a) and (b) in Ryan. Those perforations are not in any way cut lines; they are merely channels for the various layers of plasterboard to be adhered together in sandwich-like form with glue, as shown in Figs. 4 and 5, so they in no respect add to the above-mentioned deficiencies of Ernst that are addressed above with respect to claim 9. Ryan does not, therefore, satisfy the deficiencies of Ernst.

VIII. CONCLUSION

It is submitted that the reasons why this rejections should be reversed are overwhelming. Reversal of the rejection and allowance of the application is respectfully solicited.

Respectfully submitted,

  
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## IX. APPENDIX

The claims on appeal; namely, claims 1 through 9 are repeated herein.

1. A blanket of fibrous building insulation for installation in openings between studs, beams, rafters or like spaced-apart structural members that are evenly spaced-apart as well as between structural members that are irregularly spaced-apart, with cutting guidelines for use in providing visual guidelines for cutting the blanket to size to accommodate irregular spaces between spaced-apart structural members, comprising:
  - (a) a fibrous insulation layer of a predetermined thickness having opposite first and second insulation surfaces between side surfaces that are spaced apart a given dimension, which first and second insulation surfaces define said predetermined thickness;
  - (b) a thin facing sheet having first and second sheet surfaces spaced apart a dimension that is substantially less than the predetermined thickness determined by the spacing apart of the insulation first and second surfaces, with the first sheet surface thereof disposed on a second insulation surface of the insulation layer;
  - (c) a thin adhesive layer, substantially thinner than the thickness of the insulation layer, disposed between and securing the first sheet surface of the facing sheet to the second insulation surface of the insulation layer;
  - (d) a grid of perforations through the facing sheet;
  - (e) spots of adhesive visible through the perforations, at the second sheet surface of the facing sheet;
  - (f) the grid of perforations comprising means defining generally straight, predetermined cut lines for cutting the facing sheet and insulation in accordance with a pattern defined by at least some of said spots of adhesive; whereby
  - (g) the blanket of insulation may readily be cut along a line of said spots of adhesive to accommodate spaces between spaced-apart structural members of lesser spacing than said given dimension.

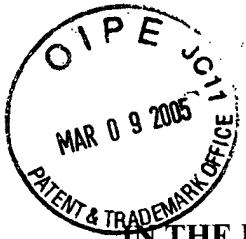
2. The blanket of fibrous building insulation of claim 1, wherein the insulation layer is of fiberglass construction.
3. The blanket of fibrous building insulation of claim 1, wherein the adhesive is asphalt.
4. The blanket of fibrous building insulation of claim 1, wherein the grid of perforations is of rectangular, intersecting horizontal and vertical lines of spaced-apart perforations.
5. The blanket of fibrous building insulation of claim 4, wherein the grid of perforations comprises four vertical, generally parallel spaced-apart cut lines, approximately 3 inches apart between side surfaces of said insulation layer.
6. The blanket of fibrous building insulation of claim 4, wherein the grid of perforations comprises three vertical, generally parallel spaced-apart cut lines, approximately 3  $\frac{3}{4}$  inches apart between side surfaces of said insulation layer.
7. The blanket of fibrous building insulation of any one of claims 5 and 6, wherein the grid of perforations comprises horizontal, generally parallel, spaced-apart cut lines, approximately 1  $\frac{1}{2}$  inches apart.
8. A method of making a blanket of fibrous building insulation for use in openings between studs, between rafters, or between like spaced-apart structural members that are evenly spaced-apart as well as between such structural members that are irregularly spaced-apart, comprising the steps of:
  - (a) providing a thin layer of facing material for later application to a substantially thicker layer of fibrous insulation, with preformed perforations through the facing material in a defined, predetermined grid comprising cutting guidelines for use in providing visual guidelines for cutting the blanket to size to

accommodate irregular spaces between spaced-apart structural members;

- (b) delivering the facing material to a site of blanket formation;
- (c) applying a thin layer of adhesive, that is substantially thinner than the layer of fibrous insulation, to a surface of the facing material while maintaining the adhesive at a sufficient viscosity that it will bleed into the perforations an amount sufficient to be visible from an opposite surface of the facing material;
- (d) applying a layer of fibrous insulation, that is substantially thicker than any thickness of each of said layer of facing material and said layer of adhesive to the adhesive-applied surface of the facing material at the site of blanket formation; and
- (e) allowing the adhesive to set and adhere the facing material to the fibrous insulation layer.

9. A method of installing a blanket of fibrous building insulation comprising:

- (a) making a blanket of fibrous building insulation in accordance with claim 8;
- (b) cutting the blanket along a line of perforations to correspond the width of the blanket to a predetermined spacing between structural members between which a blanket of insulation is to be installed; and
- (c) fastening a portion of the cut blanket of fibrous building insulation in the predetermined spacing between structural members.



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COVER LETTER

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Sir:

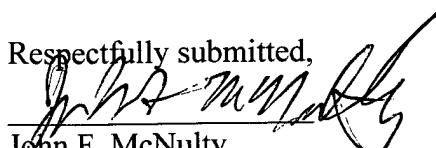
Provided herewith are 3 additional copies of a revised Appeal Brief in this case.

This is in response to the Notice of Non-Compliance of Appeal Brief based upon the changes in rules, as set forth in the M.P.E.P. pages dated February 11, 2005, in which new Rule 41.37 applies, rather than 37 C.F.R. 1.192. The enclosed Appeal Brief thus is re-drafted to comply with the new rule and its sub-parts.

This Brief is submitted within one month from the Notice of Non-Compliance dated February 25, 2005.

Because the fee for filing an Appeal Brief has previously been submitted, it is believed that no additional fee is necessary. However, the commissioner is hereby authorized to charge any additional fees associate with this communication, or credit any overpayment, to Paul & Paul deposition account No. 16-0750.

Respectfully submitted,

  
John F. McNulty

Reg. No. 23,028

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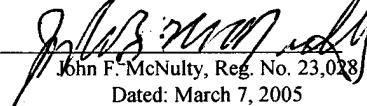
Examiner: A, Phi Dieu Tran

Art Unit: 3637

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**Certificate of Mailing**

I hereby certify that this correspondence is being deposited with the United States Post Office as first class mail postage prepaid in an envelope addressed to the Mail Stop Appeal Brief Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on March 7, 2005

  
John F. McNulty, Reg. No. 23,028

Dated: March 7, 2005

**COVER LETTER WITH CERTIFICATE OF MAILING**

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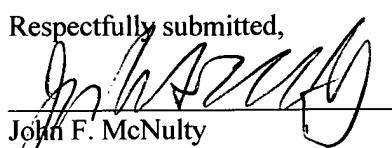
Enclosed herewith are the following:

- (1) Cover Letter with Certificate of Mailing;
- (2) Cover Letter to Commissioner for patents (in triplicate);
- (3) Appeal Brief (in triplicate);
- (4) Paul & Paul Postcard to be returned by the PTO.

THE COMMISSIONER IS HEREBY AUTHORIZED TO CHARGE ANY ADDITIONAL FEES ASSOCIATED WITH THIS COMMUNICATION, OR CREDIT ANY OVERPAYMENT, TO PAUL & PAUL DEPOSIT ACCOUNT NO. 16-0750, ORDER NO.

2979

Respectfully submitted,

  
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